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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FILIBERTO CARILLO, Defendant and Appellant.	B210060 (Los Angeles County Super. Ct. No. BA283097)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Micheal J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Filiberto Carillo of first degree murder, and found true the allegations that he personally used a firearm and committed the offense for the benefit of a gang. Carillo appeals, arguing that the trial court erred when it denied his motion to represent himself; failed to order disclosure of information regarding a prosecution witness; refused to admit evidence of third party culpability; and allowed a gang expert to testify regarding a tattoo on the back of Carillo's head. We affirm.

BACKGROUND

An information filed June 1, 2006 alleged that Carillo and Carrie Peña[1] murdered German Gomez, in violation of Penal Code[2] section 187, subdivision (a), and that Carillo used a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1). The information also alleged that Carillo committed the crime for the benefit of a criminal street gang, in violation of section 186.22(b)(1)(A). Carillo pleaded not guilty and denied the special allegations. Trial was by jury.

On November 1, 2007, Carillo moved for substitution of counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The trial court held a hearing and denied the motion. After jury selection began the next day, November 2, 2007, Carillo moved to proceed in propria persona under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525] (*Faretta*). The trial court denied the motion, and Carillo immediately again moved for substitution of counsel under *Marsden*. The trial court held a hearing and denied the second *Marsden* motion.

The jury found Carillo guilty of first degree murder and found all the special allegations to be true. The trial court sentenced Carillo to 25 years to life for first degree murder, and to a consecutive term of 25 years to life for the personal use of a firearm causing death, for a combined sentence of 50 years to life. Sentencing on the gang allegation was stayed. Carillo was awarded 1,098 days of custody credit, and was ordered to pay fines and fees. Carillo filed a timely notice of appeal.

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[1] Peña pleaded guilty on November 2, 2007, during jury selection.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

FACTS

On February 26, 2005, German Gomez, who was 14 years old, was shot and killed near the corner of Third Street and Witmer in Los Angeles. The prosecution presented Los Angeles Police Department (LAPD) Officer Jesse Audelo, who responded to a radio call and found Gomez being held in the arms of a woman, limp and crying and bleeding from his mouth and head, unable to speak. Officer Audelo had noted on his report that he arrived at 2:50 p.m. Gomez had three bullet wounds, two to his head, and one to the right forearm. The coroner testified that one bullet entered Gomez's left cheek and exited on the right side of his neck. Gomez, who was 67 inches tall and weighed about 107 pounds, would have died very quickly from his injuries.

No bullet casings were found at the scene. Police recovered a black magazine from a toy automatic weapon and a baggie of marijuana. There was blood up and down the street and on a nearby car. A bullet was recovered from a car mirror. A criminologist testified that another bullet recovered from Gomez's face was fired from the same gun.

Reina Salazar, 19 years old at the time of trial, testified that she was best friends with Gomez, grew up near Third and Witmer, and knew the gangs in the area, including the Rockwood and Witmer Street gangs. Salazar was not a gang member. She had been away for seven months in juvenile camp after a conviction for robbery. When Salazar left, Gomez was a skateboarder; by the time she returned, Gomez was "from Rockwood." She first saw Gomez again near Third and Witmer on the day of the shooting. He called to her and she spoke to him briefly, but Salazar then told him she had to go because she was with her little brother. Salazar and Gomez crossed the street together and Gomez went up Witmer alone.

Salazar was standing outside a market talking to another friend when a dark gray car pulled over with three people inside, carrying the letters "L.A." on the back window. She thought something was about to happen so she pushed her little brother inside the market and stood outside with her friend. A male and female got out of the car and headed up Witmer toward "Smiley" (Gomez's nickname). Salazar walked behind them up to a driveway.

The male and female walked quickly and stopped Gomez, who stood facing them. Gomez made a Rockwood gang hand sign. The female hit (or tried to hit) Gomez and the male pulled out a gun with his right hand. Gomez tried to hit the female back. Salazar ran back toward the market, and heard a shot followed by an "aw" sound, as if someone had been hurt, and then the sound of something being dropped. The prosecutor read into the record Salazar's testimony at the preliminary hearing that she saw a gun on the ground, that it looked like the same gun that she had seen the male holding, and that she saw the female "going down" to the gun. Salazar heard additional shots. She went back in the store and grabbed her little brother, and stayed inside. She saw the male and female run back, get into the car, and leave.

Salazar left the store after 10 or 15 seconds and walked to see what had happened. She saw Gomez trying to get up and falling several times, before he landed on the corner. A woman from the neighborhood grabbed him and held him. Police cars arrived and an ambulance came, and Salazar left with her little brother because she did not want to be involved.

Salazar testified that the male and female were Hispanic, and she noticed that the male had tattoos, including "Angels" in large block letters on the back of his head. He also had tattoos on his neck and his arm. The tattoo on his neck looked "fresh" or new. The person who waited in the car was a male, and the female was skinny, wore her hair in a bun, and had a hickey on her neck. The police later showed Salazar a six-pack photographic lineup but she did not identify anyone.

Veronica Garcia testified that she was in her car stopped at the light at Third and Witmer on February 26, 2005 when she heard gunshots. She saw people running and noticed a tan or gray car parked in front of the market. A male and female were running toward the car, and the male held a gun facing down. She went closer to see the victim and saw the male and female get into the car, which sped off. Garcia tried to call 911 and could not get through. She drove a short distance away and then returned; a woman was holding Gomez, and the police were beginning to arrive.

Garcia identified Carillo in court as the male she saw running with the gun. Garcia had first talked to the police around four days after the shooting, when she contacted Officer Guillermo Avila, who went with her to the police station, where she gave a description of the crime to Detective Julian Pere, the investigating officer. She was shown two individual photographs and identified Carillo as the man she had seen running to the car. She met a second time with Officer Avila and Detective Pere and identified Peña from a six-pack of photographs of females. The third time she met with police (Officer Avila, Detective Pere, and another detective) on March 29, she identified Carillo from the second of two six-pack photographic lineups containing his photograph. She also had identified Carillo and Peña at the preliminary hearing. Garcia told the police she did not want anyone to know she was providing information. She was afraid to be a witness at the trial, and had asked Detective Pere to go with her to the preliminary hearing because she was afraid to go by herself.

Officer Tony Fitzsimmons testified as a gang expert familiar with the Rockwood and Witmer Street gangs. Their gang neighborhoods were close to each other, and they had a long-standing feud. Officer Fitzsimmons had talked to Carillo a number of times, and Carillo had admitted to being a member of Witmer Street. Peña was also a Witmer Street member. Carillo had a number of gang-related tattoos, including "City of Angels" tattooed across the back of his head, with "City of" in small letters.

Carillo's sister was Maria Santos, whose boyfriend, Roque Rivera, was also a Witmer Street member. On February 25, 2005, the day before Gomez was shot, Rivera was shot within Witmer Street territory, and was paralyzed below the neck. Officer Fitzsimmons saw Carillo and Peña some days after Gomez was shot, on their way to the hospital to visit Rivera. Carillo had a cast covering his arm.

Officer Fitzsimmons testified that Gomez was shot in Rockwood gang neighborhood, and that he had met Gomez once, when Gomez told him he was a member of Rockwood. Gomez was relatively new to the gang. Officer Fitzsimmons testified that in his opinion, if a member of Witmer Street was shot in his gang neighborhood, the Witmer Street gang would react with the same force against the gang they believed

responsible. The gang might retaliate against a different gang member, or even the wrong gang.

In his contacts with gang members, Officer Fitzsimmons had never seen anyone other than Carillo with "Angels" tattooed on the back of his head. He had not been asked, nor had he answered, that question before the day of his testimony. Officer Fitzsimmons characterized a hypothetical similar to the facts in Gomez's shooting as a "retaliation shooting" among rival gangs.

The prosecution introduced medical records for Carillo from a hospital 2.2 miles from Third and Witmer, where on the day of the shooting he was treated for a gunshot wound to his hand at about 2:58 p.m.

The parties stipulated that the DNA profile of a sample of a mixture of blood taken from the scene on March 15 matched Gomez and an unknown male; Carillo was excluded as a contributor of the DNA. The defense then rested.

DISCUSSION

I. Denial of *Faretta* motion.

Carillo claims that the trial court abused its discretion in denying his motion to represent himself. We reject this claim.

On November 1, 2007, the parties discussed the witness list, possibilities for plea agreements for both Carillo and Peña, admissibility issues, a possible stipulation regarding the DNA evidence, the defense's intention to challenge any in-court identification by Garcia, and a defense request for production of the Witmer Street "gang book." Carillo's counsel then told the court that Carillo wished to address the court out of the presence of the prosecutor. The court heard Carillo's *Marsden* motion to substitute new counsel with all prosecution personnel out of the courtroom, and denied the motion. The court then took a recess before the prospective jury was ordered that afternoon. The proceedings resumed before the prospective jurors, and voir dire commenced.

The next day, November 2, 2007, before the prospective jurors were called back into the courtroom, Carillo immediately asked to speak with the trial court. The court

took Peña's plea outside of Carillo's presence. When Carillo reentered the courtroom, the following discussion took place:

"THE COURT: Mr. Carillo, you wanted to address the court?

Do you know what he is going to say, [counsel]?

"CARILLO: He has no idea what I am going to say.

"THE COURT: Before you start, you should not say anything on the record that could incriminate you.

"CARILLO: I understand that.

"THE COURT: Anything you say at this point the people are present and they can use it against you. That is why it is not advisable to talk—

"CARILLO: No problem.

"THE COURT: —against your attorney's advise. [sic]

"CARILLO: I understand that, your honor. I want to address the court at this moment. I would like to exercise my 6th Amendment right and *Ferreta* [sic] rights and go pro per at this time.

"[PROSECUTOR]: Should I step out of the courtroom?

"THE COURT: It is a request to go pro per. Hold on a second.

(Pause in the proceedings.)

"THE COURT: All right. Now, Mr. Carillo, what were you saying?

"CARILLO: I would like to address the court and exercise my sixth amendment and *Ferreta* right and go pro per.

"THE COURT: Are you ready today?

"CARILLO: I would be prepared.

"THE COURT: Are you ready today?

"CARILLO: I am not ready for trial. There is certain things that have not been addressed to this court as far as photo identification.

"THE COURT: That request will be denied. We already started this trial.

"CARILLO: I just wanted to say before the jury is impaneled, your honor.

"THE COURT: Mr. Carillo, what were you saying?

"CARILLO: Now, I would like to exercise my Sixth Amendment *Ferreta* right to go pro per.

"THE COURT: I already denied that motion. Anything else?

"CARILLO: I would like a *Marsden* motion.

"THE COURT: You had a *Marsden* motion yesterday. Anything extra—this is going to be yes or no—anything other than what you told me yesterday?

"CARILLO: There is other issues I want to put on the record and that is the fact I don't even have a defense. I am not ready for trial, your honor. I am not ready."

The prosecutor left the courtroom, and the trial court heard and denied Carillo's second *Marsden* motion. The court then called the jury back into the courtroom, and voir dire resumed.

A defendant has a federal constitutional right to represent himself at trial if he chooses to do so voluntarily and intelligently. (*Faretta, supra,* 422 U.S. at pp. 818–836.) The right is unconditional if the defendant "make[s] an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127–128) (*Windham*). If the request is made within a reasonable time before the commencement of trial, it is timely, and the "court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*Id.* at p. 128.) "However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required." (*Ibid.*) "In exercising that discretion, the trial court was required to consider (1) the quality of counsel['s] representation, (2) the defendant['s] prior proclivity to substitute counsel, (3) the reasons for the request, (4) the length and stage of the proceedings, and (5) the disruption or delay

which might reasonably be expected to follow the granting of such a motion." (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 591; *Windham*, *supra*, 19 Cal.3d at p. 128.)

Carillo concedes that the court had discretion to decide the *Faretta* motion, because he made the motion at the beginning of trial long after counsel had been appointed, and the motion was therefore untimely. (*People v. Frierson* (1991) 53 Cal.3d 730, 742.)

We examine the trial record, which must reflect that the trial court exercised its discretion in denying the motion, so as to permit meaningful appellate review and "to ensure that the exercise of discretion is informed and thoughtful." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048–1049.) It is error for the trial court to deny a *Faretta* motion "[w]ithout discussion or inquiry." (*Id.* at p. 1047.)

The exchange between Carillo and the trial court on the *Faretta* motion is brief. Nonetheless, Carillo stated that he was not ready to proceed and indicated that he wished to raise photo identification and other issues, encompassing several of the *Windham* factors. The transcript and the record permit us to determine whether the trial court properly exercised its discretion. (*People v. Perez* (1992) 4 Cal.App.4th 893, 904–905, fn. 10 [while court is not relieved from inquiring about *Windham* factors, denial of *Faretta* motion may be affirmed when "the reasons for the denial of the motion are absolutely clear on the record."].)

First, Carillo does not contend that the quality of representation was at issue. The trial court had just the day before denied Carillo's motion for substitution of new counsel. Second, Carillo had demonstrated a "prior proclivity to substitute counsel," (*People v. Nicholson*, *supra*, 24 Cal.App.4th at p. 591), by making a *Marsden* motion the day before, and he confirmed that proclivity by making another *Marsden* motion immediately after the court denied his motion for self-representation. Third, Carillo's reason for the request was apparently a desire to raise issues with the photo identification, an issue that had been litigated in pretrial motions and which defense counsel vigorously contested at trial. Fourth, the case was finally going to trial 16 months after the initial trial date in July 2006, due in part to defense requests for continuance. And fifth, there was a

reasonable possibility of disruption and delay if Carillo's request were granted. Carillo stated he was not ready for trial. The trial court was in the midst of jury selection. Although Carillo did not explicitly request another continuance, it is clear that one would have been necessary, because as Carillo himself stated, he was not prepared to proceed. (See *People v. Marshall* (1996) 13 Cal.4th 799, 828 [no error in denial of *Faretta* motion where trial court heavily relied on absence of showing that counsel was incompetent, because "the record reflects its explicit or implicit consideration of each of the other *Windham* factors"]; *People v. Perez, supra,* 4 Cal.App.4th at p. 904 (no abuse of discretion to deny *Faretta* motion where court did not specifically inquire about defendant's reasons, as record showed sufficient reasons for denial; previous *Marsden* motion had been denied, trial was about to commence so continuance would have been required, and defendant had failed to make *Faretta* motion the day before when court denied the *Marsden* motion.)

The trial court did not abuse its discretion in denying Carillo's *Faretta* motion.

II. Failure to order disclosure of privileged information regarding Garcia.

Carillo argues that the court erred in concluding that information about the other cases in which Garcia had given information to the police was covered by the governmental privilege in Evidence Code section 1040, and alternatively, abused its discretion in refusing to order the prosecution to disclose all information regarding Garcia's relationship with the police, including the files of all cases in which she had provided information. We agree that the requested files were privileged, but conclude that the court erred in limiting the defense's questioning of Carillo regarding her relationship with the police.

On November 5, during voir dire, defense counsel stated that upon reading over Garcia's statements to the police, he realized that she may have given information to the police in other cases. The prosecutor responded "I don't know the nature of her relationship with the police department except that I do believe that she is somebody who provided information to an Officer Avila." He promised to "inquire of the officers what she is to them, if anything." Before opening statements, the defense moved for a mistrial

on the basis that without the information about Garcia, he could not make his opening statement. The prosecution responded that the defense was entitled to information about Garcia's relationship with the police, and whether she had been paid for information. The prosecution was attempting to bring Officer Avila into court that day, and Garcia was not scheduled to testify until the following day. The court denied the motion for mistrial.

Officer Avila was present in court the next day. The defense stated: "it's our understanding that [Garcia] has been used in the period sometime in 2004 to sometime in 2005, approximately 10 to 12 months, during the period of time that this incident took place." The defense requested: "all the information that the police department can provide to me regarding her relationship with Detective Avila and the police department; her file, which I believe is characterized as 5.10 file, which is a confidential reliable informant file; all of the cases that she's worked on; all the information that she has provided; what compensation, either financial or otherwise, that she has been provided; what testimony she's given; what search warrants have been prepared with reference to her information; what cases have been dismissed; what cases went forward." Defense counsel had been told by Officer Avila that Garcia had given information to the police about other cases. The prosecutor reiterated that he did not know that Garcia had given other information to the police. The evidence was relevant, the defense argued, because "she might be in the pocket of the police" rather than an independent witness.

The prosecutor agreed that the defense was entitled to know whether Garcia had a working relationship with the police, whether it was as a citizen informant or a paid informant, how long any relationship had been in place, "and what the status is of it today." The prosecutor also argued that specific information about other cases in which she had provided information was not relevant. All that mattered was whether she had a bias or an interest in favor of the police. The prosecutor stated that as far as he knew, Garcia had not been paid for any information, and asked the court to examine the file to determine whether Garcia had received any benefit.

The court swore in Officer Avila, and the prosecution again asked for an in camera hearing because Officer Avila "does not even want the D.A.'s office to see what is in the file." The defense asserted "irrespective of [Garcia's] compensation" it wanted to see all the information that she had provided to the police.

The court held an in-camera hearing with Officer Avila to review Garcia's file, over the objection of the defense, which argued that the hearing should be in open court. After the hearing, the court indicated that it would not order the release of any files to the defense. There did not appear to be any payment to Garcia before her contacts with the police regarding Gomez's killing, and there had been no compensation regarding this case. The court concluded that Garcia's informant file and the files for all cases on which Garcia had provided information were not relevant to this prosecution. The court also stated that the police department had asserted that the information should not be disclosed pursuant to Evidence Code section 1040.

The court did rule, however, that the defense could cross-examine Garcia about information she had given to the police. The file the court had examined did not show that Garcia had been an informant "working in criminality and being part or percipient to any type of incidents in which the police have made any arrests" or prepared search warrants. The court thought that disclosure of the files of other cases would put Garcia's life in danger. The court revealed that Garcia had been involved in one buy of narcotics in which no arrests were made. The defense argued: "I think the jury has to know about her relationship to the police department and what she's done for them in the past," and the court indicated that it would not prevent the defense from asking her that question. The court stated its opinion that the police should have disclosed Garcia's status to both the prosecution and the defense, and the prosecutor explained: "I don't have any objection to him asking those questions. 'Have you been an informant for the police? Have you given information? Have you done it on more than one occasion? When did you start? Are you still doing it?' I think that's all fair game. [¶] What we're talking about is the defense's ability to discover beyond that the particular facts and

circumstances of those other incidents." The court stated that if it decided to disclose the information, the prosecution could decide not to call Garcia as a witness.

When the trial resumed the next day, the court defined the issue as "whether or not the people have an obligation to turn over to the defense all paperwork or information as it relates to Miss Garcia who has been identified." The court stated that information about other cases was not relevant, even to Garcia's credibility, "unless she has given information where she got paid in this case or surrounding this case or the issues in this case." "The defense has to show more than a mere speculation. They have to make some showing as to why this information is necessary as it relates to this case, this murder case. They have to show more than a desire to cross-examine the informant, who might have some information about this case. They have to show that the information that she might have in prior instances would tend to exculpate the defendant or inculpate the defendant." Other information Garcia might have given was not relevant, and the prosecution had stated that "over three years, she was paid $25, having nothing again to do with the facts of this case, having no connection to even the time frame of this case." The defense stated that it understood from a transcript of the March 29, 2005 interview with police that Garcia was providing the police with information about narcotics cases during the pendency of the investigation of Gomez's murder. If any of that information was false, the defense believed that bore on Garcia's credibility in this case: "prior reliability as an informant to the police is admissible to attack or support her credibility."

The defense continued to assert that it could not effectively cross-examine Garcia without all the information about her contacts with the police. The prosecutor noted "the reports and the confidentiality of the information contained in the reports is covered by [Evidence Code section] 1040. And that's the privilege that the Los Angeles Police Department is asserting." The public interest justified keeping the information confidential and still allowing the witness to testify. The defense rejoined that in attacking credibility, it was entitled to ask about "the relationship that person had with the police. How many contacts they had with the district attorney's office regarding they're trying to get a better deal and any compensation." The court responded: "We're not

saying that you can't have all that," and the defense rejoined that it also wanted to know "did that individual in the past provide information to the police department that was unreliable. Did that person do something in the past that affects their credibility in this case."

The defense requested a mistrial and a dismissal under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194]. The court denied the motion, stating, "The person can testify. You can ask her whether or not she's provided any prior information to the police and whether she's been paid for this case or not or gotten any deals from this case or any other prior case. [¶] As to whether or not it should have been provided to you, you can ask for an instruction, satisfaction in terms of discovery to know that she has, in fact, been a prior witness in a case and other cases not relevant to this case. [¶] It's not—I don't think it's—whatever she provided would have been admissible, and I don't think that prejudices your client from cross-examining her or researching her or any other information that she may have had as it relates to this case." The defense argued that the ruling limited its cross-examination of Garcia regarding her identifications: "She's in bed with the police on some level. And as a result of that, I need that information" to investigate the other cases that Garcia had been involved in.

Garcia took the stand and testified. Defense counsel cross-examined Garcia at some length, but did not ask Garcia about her relationship with the police, any information she may have provided, or any compensation she may have received.

The government information privilege codified in Evidence Code section 1040, subdivision (a), defines "official information" as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." A public entity has a privilege to refuse to disclose official information, and may prevent another from disclosing official information, where "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (*Id.*, subd. (b)(2).) The comment to the statute explains "The judge must determine in each

instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweighs the other. He should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information." (Ass. Com. on Judiciary, com., reprinted at 29B pt. 3B West's Ann. Evid. Code (2009 ed.), p. 82.) The privilege applies to an investigative police file concerning a crime, which is discoverable only after balancing the need for confidentiality against the benefits of disclosure in the particular case. (*County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 763–765.)

Evidence Code section 1042, subdivision (a) provides: "if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the [prosecution] as is required by law upon any issue in the proceeding to which the privileged information is material." In other words, even privileged information under Evidence Code section 1040 must be disclosed in a criminal trial if the information is material to the issue of the defendant's guilt or innocence. (See *People v. McShann* (1958) 50 Cal.2d 802, 807 ["there is no privilege of nondisclosure if disclosure 'is relevant and helpful to the defense of the accused or essential to a fair determination of a cause.'"].) "This provision in section 1042 is intended to preserve the constitutionality of the section 1040 privilege by ensuring that its application does not detract from the constitutional rights of criminal defendants to confrontation, cross-examination, and a fair trial." (*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1432.) "It is clear that under section 1042 the trial court does not engage in a weighing process in the traditional sense; it does *not* weigh the public interest in nondisclosure against the defendant's right to a fair trial. Rather, once the court concludes that there is a reasonable possibility that the [requested evidence] might result in exoneration, the privilege of nondisclosure simply 'will give way in the interest of justice.'" (*People v. Otte* (1989) 214 Cal.App.3d 1522, 1536, fn. 9.) Disclosure will only be ordered when the information is material to the defendant's guilt or innocence; "by its plain terms, section 1042 does not require an adverse order or finding whenever [the privileged information] is relevant. It requires

such measures only when the [information] is material. '[T]he test of materiality is not simple relevance; it is whether the nondisclosure might deprive defendant of his or her due process right to a fair trial.'" (*People v. Lewis*, *supra*, 172 Cal.App.4th at p. 1441.)

Carillo requests that we review the sealed transcript of the in camera proceedings to determine whether the trial court erred in upholding the privilege and refusing to order disclosure of the information. We have reviewed the sealed transcript of the in camera proceedings. We conclude that the trial court did not err in deciding that the records of all cases for which Garcia provided any information to the police were subject to the governmental privilege under Evidence Code section 1040.

Further, we also conclude that the trial court did not err in upholding the privilege as to the police files without making an adverse order or finding under Evidence Code section 1042, subdivision (a). The defense knew Garcia's identity; knew she had given information to the police in the past; and Garcia was available to testify, and did testify, at trial. The trial court did not err in concluding that the specific information that Garcia might have provided in other investigations and the details of those other cases were not material to the defense, and the nondisclosure of the privileged information did not deprive Carillo of his right to cross-examination or his due process right to a fair trial.

We do, however, conclude that the trial court erred in limiting the defense's cross-examination of Garcia to whether she had provided information to the police, or received compensation or "deals" from the police, *before* she cooperated in the investigation of Gomez's murder. Any arrangement Garcia may have had with the police subsequent to the investigation or at the time she testified at trial, or any payment or advantage she might have received, would be relevant to whether she was "in bed with the police at some level" and thus a basis to challenge the credibility of her trial testimony, whether or not the arrangement began before she identified Carillo as the killer. "[T]he right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility . . . ." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) The defense should have been allowed to cross-examine Garcia about any subsequent involvement, in an attempt to demonstrate that Garcia was biased in favor of the police.

Although the court did erroneously limit Carillo's right to confront witnesses against him by precluding questions about Garcia's post-investigation cooperation, payment, or other arrangement with the LAPD, the improper limitation on cross-examination is subject to harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824]. "'[A] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 208.) The inquiry is whether, assuming that the cross-examination reached its full potential to damage the credibility of the witness, a reviewing court might nevertheless conclude that the error in prohibiting it was harmless beyond a reasonable doubt, taking into consideration the importance of the witness's testimony to the prosecution's case, the presence or absence of evidence corroborating or contradicting the witness's testimony on material points, the extent of the cross-examination permitted, and the overall strength of the prosecution's case. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431].)

If the defense in this case had been allowed to cross-examine Garcia about payment or other involvement with the police after the investigation of Gomez's murder in 2005, and even if the cross-examination had shown that Garcia had an arrangement for payment or other benefit with the police that would have given her an incentive to testify untruthfully in the prosecution's favor, we do not think that the jury would have reached a different conclusion about the truth of the bulk of Garcia's testimony regarding the events of February 26, 2005. The additional impeachment value of demonstrating that Garcia's credibility was suspect *after* that date and after her subsequent meetings with the police would not have caused the jury to doubt her prior identification of Carillo.

Further, Garcia's testimony, while important, was not the only eyewitness account. Salazar testified in much more detail about Gomez's death, and while she did not identify Carillo's photograph, she testified that she saw Gomez throw a gang sign, saw the male pull out a gun, heard an "aw" after the shots as if someone had gotten hurt, and testified

that the male had an "Angels" tattoo on the back of his head as did Carillo. Her testimony corroborated material points of Garcia's testimony, provided evidence of a gang-related motive, and linked Carillo to the murder through his tattoo and the wound to his hand, for which he received treatment shortly after the murder at a nearby hospital. The prosecution's overall case was strong. We conclude that the error in limiting cross-examination was harmless beyond a reasonable doubt.

III. Refusal to admit evidence of third-party culpability.

At the preliminary hearing, defense counsel asked Salazar whether Gomez sold marijuana at Third and Witmer, over an objection by the prosecution. Salazar replied, "I was aware that he smoked, not that he sold." The court sustained the prosecution's objection to a question whether marijuana sales occurred at that location.

On November 1, 2007, before voir dire commenced, the prosecution moved to exclude evidence that marijuana was found at the site of the shooting:

"[PROSECUTION]: Okay. Another issue is that at the time of the shooting, the victim was carrying a small amount of marijuana that was actually one of the items that was collected and taken into evidence.

"At the preliminary hearing, I noticed that Mr. Kessler asked a witness a question or two about that, suggesting that the victim was engaged in marijuana sales. My interpretation of it was to suggest that his killing resulted from a drug deal gone bad, so-to-speak.

"We'd like to exclude any mention of the marijuana as it bears no relevance to this case whatsoever, and there has been put forward no plausible theory of third-party culpability. We believe that the mention of the marijuana will do nothing more than be an attempt to either sully the character of the victim or to suggest that his killing resulted from the doings of someone else.

"[DEFENSE COUNSEL]: If I may respond to that, your honor?

"THE COURT: Yes.

"[DEFENSE COUNSEL]: Number one, there was marijuana found on him. There was also found baggies of marijuana at or about the location where the shooting occurred, indicating that he may have thrown marijuana.

"So there's indication that he was probably involved and also one of the witnesses involved in the sales of marijuana. I think it's a proper area to go into because many times—and even though I don't have specific evidence of other culpability, many times drug deals and drug dealers are punished for not paying taxes; they're doing things outside the area. There's several gangs operating in this area.

"And I believe I should be able to inquire and bring in the fact that there was marijuana there. And my expert will be able to testify, and I believe will be able to testify, that there are gang areas and people discipline gang members for selling without paying a license or for not paying proper respect.

"THE COURT: All right. But you've indicated just now that you don't have any specific area of culpability. You don't have any specific information that that, in fact, was happening, do you?

"[DEFENSE COUNSEL]: No, I do not.

"THE COURT: Is anybody going to be testifying that that, in fact, was happening; or is this just speculation and something that you think happens and must have happened here?

"[DEFENSE COUNSEL]: My expert, I believe, will testify that it does happen. This is M.S. territory.

"THE COURT: But your expert has to base his expertise on facts that have or will come in in court. They can't be based on what could or would have.

"[DEFENSE COUNSEL]: Well, what I would say, it would be based on his knowledge of gangs, taxes, and that particular area. He cannot say in this specific incident that the victim was being punished for not paying taxes or for dealing without a license or dealing outside permission of the larger either 18th Street gang or M.S.

"THE COURT: Then that will not be allowed in."

On appeal, Carillo claims as error the exclusion of evidence that the victim was found with marijuana and that "baggies" of marijuana were found near the site of the shooting, classifying the evidence as showing third party culpability.

First, Carillo does not cite, and we have not found in the record, any reference outside of defense counsel's statement quoted above that "baggies" of marijuana were found at or around the scene of the shooting. Although the prosecutor had requested that the court exclude all reference to the marijuana, the record shows that Officer Audelo testified he saw a baggie of what appeared to be marijuana at the scene, and the LAPD collected two items of evidence described as "some marijuana." Carillo's opening brief repeatedly refers to "baggies" found near the shooting site. The prosecution's brief points out that there is no reference in the record to more than one baggie, and no testimony that the marijuana found belonged to Gomez. Carillo's reply brief, however, continues to assert that "the evidence indicated [the victim] may have tossed baggies of marijuana before being shot" and "the fact that marijuana was found near the victim in a baggie alone is enough to at least give rise to the suspicion that he had been engaged in drug sales." The predicated support for the drug sale theory—multiple baggies of marijuana—is therefore not supported by the record before us on appeal.

Given this record, the trial court did not err in excluding any expert testimony regarding a defense theory of third-party culpability which was based on multiple levels of conjecture: first, that Gomez was involved in selling marijuana; and second, that an unidentified third party from a different gang may have shot Gomez because Gomez was dealing marijuana without that gang's permission. "'We repeatedly have indicated that, to be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an order of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.]'" (*People v. McWhorter* (2009) 47 Cal.4th 318, 367–368.) Further, "'The

evidence must meet minimum standards of relevance: "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." [Citation.]'" (*Id.* at p. 368; see *People v. Gutierrez* (2009) 45 Cal.4th 789, 824.)

First, the defense did not identify any actual "third party" beyond speculating that two other gangs might have tried to collect taxes for drug sales in the area and pointing to *People v. Ramirez* (Mar. 30, 2009) G038125, opinion ordered nonpublished July 8, 2009, in which a gang expert testified that a gang collected taxes from any non-member wanting to sell drugs in the gang's territory, on pain of a beating or worse. There was no direct or circumstantial linking of any third party, or even any individual gang, to the shooting on a "drug tax" theory. Second, given the weight of the evidence against Carillo, such evidence would be unlikely to raise a reasonable doubt of his guilt. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174–1175.) Third, evidence about marijuana sales and gang "taxes" was excludable under Evidence Code section 352, as it had the potential to "necessitate undue consumption of time" and "create substantial danger of undue prejudice, of confusing the issues, and misleading the jury," far beyond its probative value. (*Ibid*.) Fourth, the evidence does not meet the minimum standard of relevance; it is "evidence of mere motive" in an unspecified third person, with no direct or circumstantial evidence linking any individual to the shooting.

"[E]xculpatory evidence pointing to [a third party] should not be admitted if it 'simply affords a possible ground of possible suspicion. . . .'" (*People v. Hall* (1986) 41 Cal.3d 826, 832.) The defense theory, lacking supporting physical evidence in the record or even a specified third party, was "too speculative to be relevant" (*People v. Lewis* (2001) 26 Cal.4th 334, 373). The trial court did not abuse its discretion in excluding the evidence.

IV. Admission of Officer Fitzsimmons's statement regarding the "Angels" tattoo.

Carillo contends that he was "sandbagged" by Officer Fitzsimmons's statement that he had not come across another gang member with "Angels" tattooed on the back of

his head. During Officer Fitzsimmons's testimony on November 13, 2007 and outside the presence of the jury, defense counsel pointed out that Officer Fitzsimmons had testified at a preliminary hearing in May 2006 and yet "[f]ive minutes ago at 1:30 in the afternoon he tells [the prosecutor] that he's going to testify that Mr. Carillo is the only person that he knows in that area that has an 'Angel' tattoo on the back of his head. He's never told anybody before this. He's never made a report in this regard. Never told the [investigating officer] in this case about it from what I understand." The court asked whether anyone had ever asked Officer Fitzsimmons that question before the prosecutor asked him five minutes earlier, and the following colloquy occurred:

"[DEFENSE COUNSEL]: I don't know. I have no discovery on it. He's never wrote it in—a police report on it. There's 647 pages of discovery in this case. There's no indication whatsoever that this police officer has even said that.

"So I'm asking the court to exclude it as a discovery violation.

"[PROSECUTION]: There is no discovery violation. I just asked a question based on his testimony this morning whether or not—because I thought it would be important for the jury to know whether or not this gang has a habit of tattooing their heads with 'Angels' or whether or not there was another prominent member of the gang who has a similar tattoo.

"So I asked the question, and the answer I got was: based on all of his contacts, he's the only person."

The court asked Officer Fitzsimmons if he had had contact with every gang member in the area, and he said no. The prosecutor stated that he thought the testimony would be that Carillo was the only gang member Officer Fitzsimmons had come in contact with who had an "Angels" tattoo across the back of his head, and the court ruled "It's not a discovery violation."

When testimony resumed before the jury, the prosecutor asked Officer Fitzsimmons whether he had met every gang member who operated in that territory, and Officer Fitzsimmons answered "no." The prosecutor continued: "But based on the number of contacts you did have over all the years you patrolled the neighborhoods, did

you ever come across anyone other than Mr. Carillo who had the word 'Angels' tattooed on the back of his head?" and Officer Fitzsimmons answered "[n]o one else." On cross-examination, Officer Fitzsimmons testified that he did not think he had ever told anyone, before that day in court, that Carillo was the only gang member Officer Fitzsimmons had met with "Angels" tattooed on the back of his head. On redirect examination, Officer Fitzsimmons testified that "today," was the first time he told anyone that Carillo was the only one he knew with the "Angels" tattoo on the back of his head, and also testified that he had not been asked that particular question before.

Evidence Code section 1109 provides that the prosecution must disclose to the defense any evidence to be offered "in compliance with the provisions of Section 1054.7 of the Penal Code," which, in turn, requires disclosure at least 30 days prior to trial except "[i]f the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred." The prosecution's disclosure of the evidence was immediate, as the defense learned of the testimony at the same time as the prosecution, outside the presence of the jury, and Officer Fitzsimmons testified that the first time he told anyone he had not seen another gang member with the "Angels" tattoo on the back of his head was "today."

Further, Carillo admits (as the trial court held) that this was not a discovery violation, instead alleging that the prosecution had a duty to disclose the information independent of the discovery statutes under the due process clause. The due process clause imposes on the prosecution, "*wholly independent* of any statutory scheme of reciprocal discovery," an obligation "'to disclose all substantial material evidence favorable to an accused . . . irrespective of whether the suppression was intentional or inadvertent.'" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) This evidence, however, is not exculpatory evidence favorable to Carillo. Further, the evidence did not exist prior to the prosecutor's question at trial and Officer Fitzsimmons's answer. Carillo posits that it is "more than a little suspect that this information was never mentioned in advance" but there is no evidence that the information was in the prosecution's

possession, or in the possession of another government agency, before trial. Instead, the prosecutor stated that he had not asked Officer Fitzsimmons this question before, and Officer Fitzsimmons stated he had never told anyone the answer before that day.

"With respect to untimely disclosure of evidence, it is the defendant's burden to show that a continuance cannot cure the harm of late disclosure." (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1579.) Carillo's counsel learned, at the same time as the prosecutor and outside the presence of the jury, that Officer Fitzsimmons would testify that Carillo was the only gang member he had met with an "Angels" tattoo on the back of his head; nevertheless, he did not request a continuance to cure any prejudice. Further, "there is no general obligation to gather evidence" (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624), and the prosecution's failure to ask this question earlier is not a violation of the prosecutorial duty. Defense counsel also had ample opportunity to ask Officer Fitzsimmons this question during the preliminary hearing, which would have afforded the defense plenty of time to prepare to blunt the impact of the answer at trial.

Even given the short notice, during cross-examination, defense counsel asked Officer Fitzsimmons whether "City of Angels" might be a common tattoo for Los Angeles area gang members, and Officer Fitzsimmons answered "[l]ike I said, it's not common for 'City of Angels,' but it makes sense at the same time." During closing argument, defense counsel argued that "City of Angels" was a tattoo "common to Los Angeles," and that it was highly unlikely that Carillo was "the only guy" with the tattoo despite the "thousands of members" of other gangs, adding "[s]o you take [Officer Fitzsimmons'] testimony and his credibility and his reliability as you will. And what he says about that is that he didn't write it down. He didn't tell the investigating officers. He just all of a sudden on the witness stand for the first time tells us that. [¶] Well, you know, he's the only guy. We're sitting here in trial and, boom, he's the only guy. No report, no communication whatsoever to anybody." Rather than request a continuance, counsel chose to vigorously cross-examine Officer Fitzsimmons and attack the officer's credibility during closing argument.

The admission of Officer Fitzsimmons's testimony did not violate Carillo's due process right to a fair trial.

Because we find no error, we reject Carillo's claim that cumulative errors denied him his due process right to a fair trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.